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Cayman Islands - Exempt Limited Partnership Law, 2014 provides greater structuring flexibility

Background

On 2 July, 2014 the Exempt Limited Partnership Law, 2014 (the “**Law**”) was enacted by the Government of the Cayman Islands. This new and widely anticipated legislation provides many significant and favourable updates to the previous exempt limited partnership legislation (old Exempt Limited Partnership Law (2003 Revision) (the “**old ELP**”). The Law also provides a greater level of alignment from a legislative perspective with that of the Delaware Revised Uniform Limited Partnership Act and in doing so may provide a greater ability to facilitate structures adopting the master/feeder structure, thereby potentially attracting more asset managers to use the Cayman Islands for their product offerings.

The Law introduces a number of changes including provisions relating to the replacement of general partners, execution of documents, taking of security over partnership interests, admission of partners, transfer of partnership interests and winding up of an exempted limited partnership (a “**Partnership**”). The Law also provides for the re-domiciliation of Partnerships to and from Cayman. This briefing sets out a summary of the proposed changes and how they might impact those using or considering the use of Partnerships.

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General Partners acting in the best interests of the Partnership?

One of the most notable changes to the old ELP is that a Partnership agreement will now be able to provide that a general partner of a Partnership (a “**General Partner**”) need not act in the interests of the Partnership. Up until now, the General Partner was required under the old ELP to act ‘*at all times in good faith in the interests of the exempted limited partnership*’. Under the Law, this duty placed on the General Partner has been amended to provide that this duty to act at all times in good faith in the interests of the exempted limited partnership may be varied and may be subject to the provisions of the relevant partnership agreement. Accordingly, a General Partner which acts for one or more limited partnership may take the interests of another limited partnership or fund into account when exercising the duties afforded to it in respect of any one limited partnership to which it is appointed. This could be desirable where a General Partner is obliged to deal with the competing interests of investors and service providers, particularly with regards to remuneration arrangements.

Limited Partners involvement and potential liability

One issue which was consistently identified as an area of concern for investors was the impact on the concept of limited liability of limited partners who participated in certain activities relating to Partnerships. The investors in Partnerships are always concerned that their participation (or their representatives participation) would need lead to a potential liability being attributed to them. In this regard, the existing list of activities a limited partner can undertake without taking part in the business of a Partnership (thereby risking loss of their limited liability) has been expanded by the Law, which now allows a limited partner to: -

- (i) act as a member of any committee of the Partnership or any of its general partners or limited partners including giving advice or consenting to any action proposed by a General Partner; and
- (ii) to act for, advise, consult or have an interest in any entity in which the Partnership has an interest or which provides services to the Partnership or its General Partner.

The Law also provides that, subject to the Partnership agreement, members of a committee are deemed to have notice of and the benefit of provisions of the agreement relating to the committee regardless of whether they are a party to it. Members of such committees will also only have those fiduciary duties provided for in the Partnership agreement. A person executing the Partnership agreement, or identified in it, will not thereby be deemed to be a partner under the new law.

Additionally, the Law allows a Partnership agreement to include votes of persons who are not limited partners in decisions relating to the winding up of the Partnership or the appointment of a new General Partner. The Law further clarifies that a limited partner only owes fiduciary duties if they are provided for in the Partnership agreement. These provisions refine the old ELP regarding the use of committees and provide greater flexibility to regulate the operations of committees which can be an important part of the Partnership structuring for investors.

Treatment of Defaulting Investors

Question marks have often been raised regarding the treatment of investors in Partnerships who default on their obligations, especially regarding the issue forfeiture of the defaulting investor's interest in the Partnership. The primary issue related to whether or not such forfeiture provisions were in effect and could be considered to be penalty clauses, which, in keeping with common law rules established under English law, are unenforceable under Cayman Islands law. The Law has sought to clarify this particular matter and expressly states that remedies against defaulting limited partners of a Partnership will not be unenforceable solely on the basis that those remedies are penal in nature. This will remove a long held doubt over the enforceability of forfeiture and other provisions of Partnership agreements and give comfort to investors and managers that common default provisions will be effective.

Appointment and Replacement of General Partner

The Law makes it clear that the Partnership does not lose its limited liability on the departure of its Cayman domiciled or registered General Partner. The Law also provides that any new General Partner will have all rights and property of the Partnership vested in them and any continuing General Partners without the need for further formality. Similarly on the retirement of any General Partner such rights and property will vest in the remaining General Partners without further formality. These provisions provide additional comfort when making changes to the General Partners of a Partnership.

Foreign Limited Partnerships

The Law has also made provision for further options regarding structuring by permitting the registration in Cayman of foreign limited partnerships or limited liability partnerships where they are established in an approved jurisdiction to act as General Partners. Once registered the foreign limited partnership or limited liability partnership will be able to act as the General Partner to a Partnership and thereby expanding the possibilities for multi-jurisdictional Partnership structures. The list of approved jurisdictions has yet to be formally detailed.

Execution of Documents

The Law provides for a Cayman statutory departure from English case law relating to the formalities for execution of documents and also provides for a statutory departure from the Cayman law formalities for the execution of a power of attorney.

Under the Law, any Partnership agreement, deed of accession and any document entered into by the General Partner on behalf of its Partnership will be validly executed where it is signed as contemplated by the parties and in conformity with Cayman law, including where signature pages are executed before the document is in final form and attached to the document with the relevant party's authority.

Where a Partnership agreement contains a power of attorney, the power of attorney will be deemed validly executed on the execution of the Partnership agreement or on adherence thereto by the donor limited partner without further formality.

These provisions, in the specified circumstances, remove the risk of agreements being challenged on technical grounds of failure to observe formalities and allow a more practical approach to be taken at completion. It is of interest to note that these provisions are also expressed to have retroactive effect.

Security

The Law clarifies that Partnership property includes any right to make capital calls and receive the proceeds thereof and that the Partnership agreement may allow a General Partner to transfer or grant a security interest in his Partnership interest with the prior written consent of any other General Partner.

It also expressly permits a Partnership agreement to provide that a disposition of rights under the agreement shall confer economic rights only. Notwithstanding the winding up of the Partnership the Law confirms that a secured creditor is entitled to enforce their security without leave of the court.

In addition, the Law also introduces the concept of a floating charge and provides that the assets of a Partnership may be subject to a floating charge whether or not the partners are companies, overseas companies or bodies corporate. The provisions bring clarity to a number of areas regarding the taking and enforcement of security over Partnership interests and provide additional flexibility regarding financing options for Partnerships.

Admissions and Transfers

The Law contains provisions confirming that a partner may be admitted by execution and delivery of the Partnership agreement (or any supplement or counterpart) with the General Partner and without the consent of the limited partners. Where the requirements for admission of a partner as set out in the Partnership agreement are complied with, the Law provides that the person admitted is deemed to have adhered to and agreed to be bound by the Partnership agreement as if they and all existing partners had executed and delivered the Partnership agreement. This provision is also expressed to have retrospective effect. These provisions will allow for additional drafting flexibility for partnership structures.

Winding Up

The Law also amends the current provisions for filing of notices on a winding up and introduces a new strike off procedure for Partnerships. Generally, the strike off procedure is likely to be used only where a Partnership has not traded because it will not affect the liabilities of any partner which may be enforced as if the Partnership had continued. Accordingly, the strike off process does not afford the finality of a winding up.

Transfers by way of Continuation

In keeping with similar arrangements for companies, the Law expressly allows a Partnership to re-domicile to another jurisdiction which permits, or does not prohibit, that re-domiciliation on satisfaction of certain conditions including prescribed notices and solvency/financial requirements.

A partnership established other than under Cayman law will also be allowed to register under the Law without creating a new entity or affecting any property of the Partnership. These provisions may provide an attractive route to restructure a Partnership to a new jurisdiction without the negative tax implications of a realization event for investors.

Foreign naming conventions

The Law also provides for registration of a Partnership with a dual foreign name including names in non-Roman scripts which may be attractive to Partnerships with, or which target, investors in the CIS, Asia, the Middle East or North Africa.

Application

The Law also includes saving provisions, so no action will be required by existing Partnerships in order to fall within the new law. Notwithstanding this fact, the drafting flexibility brought in by the Law may, however, prompt a review of existing Partnership agreements where increased flexibility might be attractive and be of interest to asset managers and investors.

Summary

The introduction of the Law and its new features is a welcome development. It will improve the statutory regime applicable to Partnerships and make such structures less complicated for asset managers and investors alike.

If you would like further information in relation to the establishment of Cayman Islands limited partnership structures or have any queries in relation to the Law, then please contact Matt Mulry (matt.mulry@dilloneustace.ie)

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